UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

KARI SUNDSTROM, *et al.*,

Plaintiffs,

v. Case No. 06-C-0112 (CNC)

MATTHEW J. FRANK, *et al.*,

Defendants.

PLAINTIFFS' SURREPLY BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs submit this brief to address new arguments raised for the first time in Defendants' Reply Brief in Support of Defendants' Motion for Partial Summary Judgment [Doc. No. 159] ("Reply Brief").

In their initial Brief in Support of Partial Summary Judgment [Doc. No. 121] ("Defendants' Brief"), the Defendants argued that the Court should reject Plaintiffs' facial challenge to 2005 Wisconsin Act 105, Wis. Stat. § 302.386, because it could be "applied" without violating the constitution to deny hormone therapy and sex reassignment surgery to: (1) any inmate who does not even have Gender Identity Disorder ("GID") (Defs.' Br. at 8-9); or (2) any inmate with GID for whom the treatment is not medically necessary (Defs.' Br. at 9).

After Plaintiffs explained in their Brief in Opposition to Summary Judgment [Doc. No. 138] ("Plaintiff's Brief") that the cases have defined "application" to include only those circumstances in which a challenged statute imposes "an actual rather than an irrelevant restriction" (Pls.' Br. at 8, quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992)), the Defendants changed their argument.

In their Reply Brief, for the first time, Defendants argue that the Act has constitutional applications, because prisoners with GID have no right to hormone therapy or SRS even if a "physician might otherwise prescribe hormonal and surgical procedures as treatment for their GID...."(Reply Br. at 2-4).

Defendants' new argument is simply incorrect as a matter of law. Defendants cite cases that do not support their position, since they are all cases in which the prison doctors do *not* believe that either hormones or surgery should be prescribed as medically necessary.

Plaintiffs have never claimed that they are entitled to hormone therapy or SRS because they "desire" it or "choose" it. Nor do they claim it because an outside medical expert believes that the treatment is medically necessary. Instead, they claim that they have a right to the medically necessary care to treat their serious GID, *as determined by DOC health care professionals* in the exercise of their medical judgment. The problem with Act 105 is that it deprives Plaintiffs of medical care that *DOC medical personnel* believe is medically necessary for them. In the case of all of the current Plaintiffs, the undisputed medical judgment of their DOC care providers is that hormone therapy is medically necessary treatment. Defendants' medical personnel will decide that hormone therapy and possibly even surgery in some rare cases are medically necessary for inmates in the future, but Act 105 will impermissibly prevent them from providing it. Each such instance constitutes an application of Act 105.

Accordingly, this case is unlike both *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997),[1]

[1] In *dicta*, *Maggert* asserts that "cure for the male transsexual" inevitably involves sex reassignment surgery, and expresses doubt that such treatment could ever be required by the Eighth Amendment. 131 F.3d at 671-72. The facts developed in this case contradict the *dicta* in *Maggert*, a case litigated by a *pro se* plaintiff without the benefit of expert testimony about the nature of GID or its appropriate treatment. Individuals with severe GID ("transsexuals") have a serious medical need for hormone therapy or sex reassignment surgery. (PFOF ¶ 7) [Doc. No. 139]. Hormone therapy may be sufficient to eliminate gender dysphoria for some individuals, without the need for surgical interventions. (PRESP ¶ 1-2; PFOF ¶ 10). In a very small fraction of cases, SRS is medically necessary to treat profound distress that cannot be

and *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986), in which there was no definitive medical judgment by treating physicians that hormone therapy was medically necessary to treat the plaintiffs' alleged GID. Indeed, in *Maggert*, the plaintiff had never even been diagnosed with GID, so the circuit court's subsequent discussion of the "broader issue" of its appropriate treatment in prison was unnecessary to the decision of the case, as the court itself recognized, and thus is *dictum*. *Maggert*, 131 F.3d at 670 (affirming dismissal where the prison "psychiatrist does not believe that Maggert suffers from gender dysphoria. . . . Maggert has not submitted a contrary affidavit by a qualified expert and so has not created a genuine issue of material fact that would keep this case alive."). In *Supre*, although the plaintiff clearly had GID, the prison medical professionals involved in her care disagreed about whether hormone therapy was medically necessary. *Supre*, 792 F.2d at 960 (noting disagreement among prison treating providers as to appropriateness of hormone therapy).[2] If certain prisoners with gender identity issues have not *both* been diagnosed *and* prescribed hormone therapy or SRS as medically necessary by DOC medical providers, the Act would not "apply" to them for purposes of determining whether Act 105 has any constitutional "applications." To such hypothetical prisoners, the Act is simply an "irrelevant" restriction, and thus not an "application" at all. *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992). For Plaintiffs, and for other prisoners for whom hormone therapy or SRS would be medically necessary treatment prescribed by DOC physicians but for Act 105, the Act is unconstitutional, because it bars the treatment of a serious

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alleviated through hormone therapy or other less invasive interventions. (PRESP ¶ 3; PFOF ¶¶ 7, 12). Defendants' contention that a transsexual "chooses" which treatments are sufficient to alleviate distress (Defs.' Response to PFOF ¶ 7) is not supported by the evidence in this case, which shows that necessary treatment is determined through the individualized evaluation of health care providers. (PFOF ¶ 7).

[2] Defendants claim that the prison system in *Supre* had adopted a policy precluding hormone therapy and surgery. Reply Br. at 4. Although the prison system had adopted an *interim* policy that appeared to do so, the operative policy at issue in the case "would not preclude estrogen therapy." *Supre*, 792 F.2d at 960-61).

medical need. *See Edwards v. Snyder*, 478 F.3d 827, 830-31 (7th Cir. 2007) (the objective "serious medical need" element of Eighth Amendment claim is satisfied by "a medical condition 'that has been diagnosed by a physician as mandating treatment'"). Since these are the only situations in which the Act "applies," the Act is unconstitutional in all its applications, and thus facially invalid.

Defendants also argue for the first time that, as long as they provide *some* treatment for prisoners' GID, they have satisfied the Eighth Amendment, even if they do not provide the hormone therapy or SRS that DOC medical staff have prescribed as medically necessary. Reply Br. at 3. This is simply a misstatement of the law. If a treatment is necessary to treat a medical condition, a defendant cannot escape Eighth Amendment liability by providing plainly ineffective alternative treatments. *See, e.g.*, *Edwards*, 478 F.3d at 831 (7th Cir. 2007) ("a plaintiff's receipt of *some* medical care does not automatically defeat a claim of deliberate indifference," if fact-finder could determine treatment was "blatantly inappropriate"); *Kelley v. McGinnis*, 899 F.2d 612, 616 (7th Cir. 1990); *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (Eighth Amendment plaintiff need not prove a "complete failure to treat"); *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir. 2000) ("Even if prison officials give inmates access to treatment, they may still be deliberately indifferent to inmates' needs if they fail to provide prescribed treatment."). Again, if some hypothetical prisoners with GID could be effectively treated, in the medical judgment of DOC medical staff, without hormone therapy or SRS (perhaps with psychotherapy alone), the Act would not "apply" to them, because it imposes no restriction on their right to treatment for a serious medical need. However, for Plaintiffs, and for other prisoners for whom hormone therapy and surgery would be prescribed as medically necessary but for Act 105, the Act is unconstitutional in all of its applications.

Defendants unsuccessfully attempt to distinguish *De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003), which held that an Eighth Amendment plaintiff may prevail by proving that "refusal to provide hormone therapy to [plaintiff] was based solely on the policy rather than on a medical judgment concerning [plaintiff's] specific circumstances." Defendants characterize *De'Lonta* as holding only that a claim is not barred as a simple "medical judgment dispute" when a decision to deny treatment resulted from a prison policy rather than the physician's judgment. Reply Br. at 5. It is not entirely clear how this distinction makes a difference. Plaintiffs do not claim, and *De'Lonta* does not hold, that a policy against treatment is *per se* actionable, without proof that the policy deprives a prisoner of medically necessary treatment. In fact, the bare existence of the policy is not an "application" of the policy at all, since its restrictions are "irrelevant." In this case, in contrast, the Act, when it applies, prohibits Plaintiffs and other prisoners for whom hormone therapy or SRS would have been prescribed as medically necessary from receiving the very treatments that their DOC medical providers have determined are medically necessary to treat their GID. It is thus invalid in all its applications and facially unconstitutional.

Dated this 27th day of September, 2007.

Respectfully submitted,

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